

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING
EN BANC**

76-1165

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

THEODORE N. CAMERIERO
and JOHN FRANK GALANTE,

Defendants-Appellants.

B
PMS
Docket No. 76-1165

PETITION FOR REHEARING FOR APPELLANT
THEODORE N. CAMERIERO
CONTAINING A SUGGESTION FOR REHEARING EN BANC

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
THEODORE N. CAMERIERO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLLIS SKLOOT BAMBERGER,
Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA, :
Plaintiff-Appellee, :
-against- :
THEODORE N. CAMERIERO :
and JOHN FRANK GALANTE, :
Defendants-Appellants. :
-----x

Docket No. 76-1165

PETITION FOR REHEARING FOR APPELLANT
THEODORE N. CAMERIERO
CONTAINING A SUGGESTION FOR REHEARING EN BANC

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

This petition for rehearing is made pursuant to Rule 40(a) of the Federal Rules of Criminal Procedure to review a decision of a panel of this Court (Kaufman, Ch.J.; Mansfield and Meskill, C.J.J.) rendered on December 14, 1976, affirming a judgment of the United States District Court for the Eastern District of New York convicting appellant Cameriero of possession of goods stolen from interstate commerce and conspiracy to commit that

that crime. Appellant Cameriero claimed on his appeal, as he had in the district court, that the evidence against him -- cartons of camera lenses -- were illegally seized and therefore inadmissible at trial. A brief summary of the facts is essential:

Fifteen cartons of Nikkor lenses were stolen from a Brooklyn warehouse on March 22-23, 1975. Menachem Cohen, a co-defendant and government witness, testified that Galante and another man named Joe made arrangements to keep some boxes in the basement of Cohen's store in exchange for payment. A day or two later, Galante, with Cameriero, brought boxes containing lenses to the store. Cameriero left the store. Galante took a sample lens from each box for Cohen to sell, and then Cohen and Galante put the cartons in the basement, covering the door with a wooden panel (Minutes of January 28, 1976, at 70-72).

After Cameriero had left the store, Galante told Cohen that the lenses had been stolen (72, 129*). Cohen said he wanted the boxes removed.

Cohen tried to sell some of the lenses, and was arrested on April 4, 1975, in the Southern District of New York. At the time of his arrest, he made a false exculpatory statement to the United States Attorney for the Southern District of New York to escape the consequences of his arrest but was nonetheless

*Numerals in parentheses refer to pages of the transcript of the trial; when preceded by "H," such numerals refer to pages of the transcript of the suppression hearing.

less charged with a crime.*

On April 9, 1975, four FBI agents entered Cohen's store and told Cohen that they had come to conduct a search. Cohen refused to permit a search. After Cohen's refusal, one agent went to get a warrant while the others maintained surveillance on the store.

The affidavit submitted to obtain the warrant was conceded by the Government on the appeal to be invalid under United States v. Karathanos, 531 F.2d 26 (2d Cir. 1976). The affidavit** stated that agents had been told by a confidential informant that stolen camera lenses were seen in Cohen's store. The affidavit made no allegations as to how the informant knew that the lenses were stolen or where they originated, and the

*Cohen was also arrested by state authorities, but the state charges were dismissed.

**In pertinent part, the affidavit stated:

(2) A reliable confidential informant, who has previously supplied information to the Federal Bureau of Investigation which information has resulted in the arrest of six individuals in both the Eastern and Southern District of New York for the theft of approximately Two Hundred and Fifty Thousand Dollars (\$250,000) worth of stolen merchandise, which arrests have resulted in two convictions, has stated that he was in the above-described premises known as Bristol Bargain Fair, Inc., on April 7, 1975. While in the above-described premises the reliable informant observed the Nikkor Camera Lens as well as Precor Radios and APF Scientific Calculators that were stolen from the Greenpoint Terminal Warehouse on March 22, 1975.

agent testified that he had made no independent observations to confirm the information.

Armed with their concededly invalid warrant, the agents began their search.

One agent testified that after about twenty minutes of the search (H.50), Cohen told the agent that he, Cohen, wished to cooperate and make a deal with the FBI (H.48).* The agent testified that he gave Cohen his Miranda warnings and told him that the agents were looking for stolen merchandise at the store (H.50). According to the agent, Cohen finally revealed his involvement with the stolen goods (H.63-64) and his April 4 arrest, and said that the merchandise was in the store but that the agents would never find it. The agent responded that the agents would conduct a full search (H.51), that they were "a very thorough outfit," and that they would find the goods (H.58). Cohen replied that he did not ~~think~~ his place ripped apart (H.58) and that he would reveal the location of the merchandise. He did so (H.51-52) after five to seven FBI agents had unsuccessfully spent an hour looking for the goods (H.59).

At his own request, no arrest was made of Cohen at that time. Cohen had wanted his arrest delayed until someone came for the goods (H.70), and this arrangement was made (H.71). The agents left the boxes in the store to see who would pick them up.

*At trial, Cohen said that he did not make such a statement (90).

The next day, April 10, Galante called to say he would see Cohen later. During the afternoon, he arrived at the store and said he would make arrangements to remove the boxes.

On April 11, Galante called to say that someone was coming between 3:00 and 3:30 p.m. to pick up the boxes (Minutes of January 28, 1976, at 83).

Cameriero arrived and assisted in the loading of the truck (Minutes of January 28, 1976, at 84). Cohen and Cameriero were then arrested (Minutes of January 28, 1976, at 84). They and Galante were indicted for possession of goods stolen from interstate commerce and conspiracy to commit that act.

At trial, the Government argued that the search and seizure were conducted pursuant to a legal warrant and Cohen's consent. On appeal from a denial of the motion to suppress, the Government conceded, as previously noted, that the warrant was invalid and, in addition, that Cohen had not given consent to search. The Government relied on lack of standing of Galante and Cameriero to sustain the search and seizure.

The opinion of the panel found no standing as to the conspiracy count. However, on the substantive count of possession, the panel relied on two theories of lack of taint to sustain the agents' conduct. The two theories are discussed at Points I and II, infra.

I.

Taint cannot be avoided based on a hypothetical inevitable discovery.

To find that the seizure had not been tainted by the prior illegal search, the panel concluded:

[I]t is not at all clear that the initial, illegal search was the but-for cause of the subsequent seizure. Had the police never sought a warrant, or had their application for one properly been denied, they would in all likelihood have placed the Bristol Bargain Fair under surveillance. As we indicated above, a seizure growing out of such activity would have been entirely valid.

This statement conflicts with no fewer than seven decisions of this Court which require that the Government establish by a preponderance of the evidence that the challenged evidence was obtained by legal means independent of the primary illegality.

United States v. Ceccolini, 542 F.2d 136 (2d Cir. 1976); United States v. Capra, 501 F.2d 267, 280 n.12 (2d Cir. 1974, cert. denied, 420 U.S. 990 (1975); United States v. Falley, 489 F.2d 33, 40-41 (2d Cir. 1973); United States v. Cole, 463 F.2d 163, 171-174 (2d Cir.), cert. denied, 409 U.S. 942 (1972); United States v. Friedland, 441 F.2d 855 (2d Cir.), cert. denied, 404 U.S. 867 (1971); United States v. Schipani, 414 F.2d 1262, 1266 (2d Cir. 1969), cert. denied, 397 U.S. 922 (1970) (see United States v. Cole, supra, 463 F.2d at 172)); United States v. Tane, 329 F.2d 848, 853 (2d Cir. 1964).

Despite this clear legal requirement, the Government could not show -- indeed, it did not even argue -- that the lenses

were obtained through legal investigation independent of the unlawful search. The facts establish that the property was located and seized as a result of the illegal conduct,* and the panel itself acknowledges in its opinion that the discovery of the cartons was not due to any surveillance, which would have been a proper means of investigation, but due to the search conducted after the illegal warrant was obtained.

The panel's opinion in this case, relying not on what the agents did, but on what they might have done, is not only inconsistent with precedent, but demonstrates why this Circuit has required proof that evidence has actually been obtained by legal means. This decision permits the Government to meet its burden of proof by speculating as to how the evidence might have been obtained legally when the actions of the agents were, in fact, illegal.

Here, of course, the dangers of speculation are demonstrated. The testimony of the agent was that he saw nothing while in the store.** There was no proof that the surveillance team at the store while application was made for the warrant made any relevant observations. Furthermore, the intensive search, lasting more than one hour, turned up nothing. In addition, since Cohen himself helped to set up the plan for removal of the boxes only

*It is Cameriero's position that Cohen's conduct did not legitimize the agents' action. See infra at 8.

**The agent was in the store for at least several minutes because he waited while Cohen conferred with his attorney by telephone.

as the result of the illegal search and to avoid his own immediate arrest, it was not at all certain that the agents would have legally observed anything justifying the seizure. Thus, not only is speculation an extraordinarily dangerous venture, but in this case speculation did not justify the hypothetical inevitable discovery so as to eliminate taint.

II.

THERE WAS NO "BREAK IN THE CHAIN" TO END THE TAINT.

The alternative holding of two members of the panel is that Cohen's disclosure of the location of the boxes was voluntary cooperation which broke the chain in causation and prevented the seizure from being tainted by the earlier illegal search.* The panel relies on a version of evidence that does not appear in the record -- that Cohen, realizing he was implicated, began his cooperation when the agents were about to leave the store. What the testimony shows was that Cohen refused to cooperate, even to the point of giving a false exculpatory statement when he was arrested in the Southern District and refusing to consent to a search of his store until the agents appeared with what appeared to be a valid warrant and began their intensive search. Even then, Cohen did not show the agents where the boxes were. His

*While the panel holds that it is not relying on the issue of consent (see slip opinion at 962, n.2), it is logically impossible to see how, on these facts, voluntary cooperation could break the chain if it was not consent.

revelation of the hidden basement door came only after the agents said they were a good outfit and would not leave until they found the boxes. In response, Cohen said he did not want his store ransacked and would show the agents the boxes. This conduct, responsive to the agents' conduct which was premised on an illegal warrant, cannot be said to be voluntary. The opinion of the majority to the contrary is in direct conflict with United States v. Tane, supra, 329 F.2d at 853, where the witness refused to testify before the grand jury until the Assistant District Attorney revealed the existence of a wiretap that had been illegally obtained. The decision is also inconsistent with United States v. Karathanos, supra, 531 F.2d at 35, and United States v. Ceccolini, supra, 542 F.2d at 141, where the strategic benefits accruing to the Government from its illegal conduct were used to obtain evidence. In Karathanos, the agents used the fruits of what was later held to be an illegal search to get deportable immigrants to testify. In Ceccolini, the agent used illegally obtained evidence of gambling to interrogate the defendant's employer. Here, the agents used their acts of searching, later found to be illegal, to obtain from Cohen the location of the goods and permission to search the basement.

The majority opinion relied for legal support of its decision on United States v. Mullens, 536 F.2d 997 (2d Cir. 1976). Mullens had freely come to the agents and made a statement after being told by a relative that his parents had been arrested. The search and resulting arrest were illegal, but Mullens' conduct

was held voluntary. In Mullens, of course, the agents did not exploit the illegality.

Judge Kaufman declined to adhere to the position of the majority opinion, finding that Mullens' voluntary cooperation to exonerate his mother was qualitatively different from Cohen's desire to mitigate his situation which would have worsened had the agents carried out their threat not to leave until the lenses were found. Judge Kaufman's warning about the dangers of extending Mullens beyond its facts should be heeded to control illegal government conduct.

III.

CAMERIERO HAD STANDING TO CHALLENGE THE SEARCH AND SEIZURE AS IT RELATED TO THE CONSPIRACY COUNT.

The court ruled that there was no per se or factual basis for finding that Cameriero had standing to challenge the agents' conduct as it related to the conspiracy count because possession was not an element of the crime. However, the Government relied upon, and the trial court charged, that possession of recently stolen goods may be sufficient to find that a defendant had knowledge that the goods were stolen. Under Barnes v. United States, 412 U.S. 837 (1973), proof of possession which was unexplained is a substitute element for direct proof of the requisite knowledge, and knowledge is an element of the conspiracy as well as of the substantive crime. Iannelli v. United States, 95 S.Ct. 1284, 1289-1290 (1975); Direct Sales Co. v. United

States, 319 U.S. 703 (1943); United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975); United States v. Steward, 451 F.2d 1203 (2d Cir. 1971); United States v. Hysohion, 448 F.2d 343, 347 (2d Cir. 1971). Since the record shows that appellant Cameriero was not present when Galante told Cohen that the goods were stolen, it was Cameriero's possession of the goods that provided the basis for making the inference that would enable the jury to find the requisite knowledge for the conspiracy count as well as for the possessory count.* Accordingly, the Government should not be able to establish knowledge and then argue lack of standing.**

Another basis for standing is actual possession during the search and seizure (see Brown v. United States, 411 U.S. 223 (1973)). Cameriero was in actual possession of the goods when they were seized from the truck. The panel's interpretation that this possession occurred after the illegal search, and thus does not give standing (slip opinion at 965, n.5) is a distortion of the record. The illegal search began a con-

*The judge made no distinction between possession at the time the cartons were delivered and the time Cameriero picked them up.

**While the Government need not rely on proof of possession to show knowledge, it clearly did so here. To make proof of possession critical to proof of the case and then to deny the defendant standing on that fact is the very prosecutorial inconsistency to which Brown v. United States, 411 U.S. 223 (1973) refers. Reliance on Brown and United States v. Sacco, 436 F.2d 780, 784 (2d Cir.), cert. denied, 404 U.S. 834 (1971), for a contrary proposition is not warranted, since those cases did not consider the effect of the presumption from possession.

tinuum of conduct that included constructive possession of the goods before they were removed from the basement and that ended in actual seizure. Cameriero's presence and possession occurred during the time of this illegal Government action, and he was accordingly in possession of the goods and present at the time of the illegal search and seizure.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
THEODORE N. CAMERIERO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

CERTIFICATE OF SERVICE

December 29, 1976

I certify that a copy of this rehearing petition has been mailed to the United States Attorney for the Eastern District of New York and to H. Elliot Wales, Esq.

Ruth Skloff/Ben Bogen

